FOR ARGUMENT

Supreme Court, U.S.
FILED
AUG 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1182 and 88-6651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

JACQUELINE BOUKNIGHT,
Respondent.

MAURICE M.,
Petitioner,

v.

JACQUELINE BOUKNIGHT,
Respondent.

On Writ Of Certiorari
To The Court Of Appeals Of Maryland

REPLY BRIEF OF PETITIONER MAURICE M.

MITCHELL Y. MIRVISS
Counsel of Record
STUART R. COHEN
KATHI GRASSO
M. GAYLE HAFNER
SUSAN DISHLER SHUBIN
Legal Aid Bureau, Inc.
714 East Pratt Street—7th Floor
Baltimore, MD 21202-3105
(301) 539-5340
Attorneys for Petitioner Maurice M.

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY ARGUMENT	1
I. THE RESPONDENT HAS FAILED TO APPLY THE TESTIMONIAL ANALYSIS OF *FISHER* AND *SCHMERBER*	1
A. Police Activity Is Not A Relevant Consideration	1
B. Maurice's Condition Does Not Affect The Testimonial Analysis	3
II. THE RESPONDENT HAS FAILED TO CONSIDER THE COMPELLING INTEREST IN PROTECTING CHILDREN AT RISK OF INJURY	6
A. The Juvenile Court's Order To Produce Maurice Does Not Compromise Core Values Of The Fifth Amendment	6
B. Criminal Prosecution Is No Solution To Maurice's Immediate Need For Protection	9
C. Maurice's Safety Must Be This Court's Paramount Consideration	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Bellis v. *United States*, 417 U.S. 85 (1974) 5
Braswell v. *United States*, 487 U.S. ____, 108 S.Ct. 2284 (1988) 5, 7, 11
California v. *Byers*, 402 U.S. 424 (1971) 7, 8, 11
Couch v. *United States*, 409 U.S. 322 (1973) 7
Curcio v. *United States*, 354 U.S. 118 (1957) 7
DeShaney v. *Winnebago County Department of Social Services*, ____ U.S. ____, 109 S.Ct. 998 (1989) ... 10, 11
Doe v. *United States*, 487 U.S. ____, 108 S.Ct. 2341 (1988) 1, 4, 6
Fisher v. *United States*, 425 U.S. 391 (1976) 1, 3, 4, 7
Gardner v. *Broderick*, 392 U.S. 273 (1968) 8
Gilbert v. *California*, 388 U.S. 263 (1967) 5
Hale v. *Henkel*, 201 U.S. 43 (1906) 11
In re Harris, 221 U.S. 274 (1911) 6, 7
Hoffman v. *United States*, 341 U.S. 479 (1951) 4
Holt v. *United States*, 218 U.S. 245 (1910) 5
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977) 8, 10
Marchetti v. *United States*, 390 U.S. 39 (1968) 8
McCarthy v. *Arndstein*, 266 U.S. 34 (1924) 6, 7, 11
McPhaul v. *United States*, 364 U.S. 372 (1960) 4
New York v. *Quarles*, 467 U.S. 649 (1984) 9, 11
Schmerber v. *California*, 384 U.S. 757 (1966) 1, 5
South Dakota v. *Neville*, 459 U.S. 553 (1983) 11
United States v. *Doe*, 465 U.S. 605 (1984) 1, 4
United States v. *Fleischman*, 339 U.S. 349 (1950) 4
United States v. *Rylander*, 460 U.S. 752 (1983) 4, 5, 7
United States v. *Wade*, 338 U.S. 218 (1967) 5

CONSTITUTIONAL PROVISIONS
United States Constitution
Fourth Amendment 5
Fifth Amendment ..... *passim*

STATUTES
Md. Cts. & Jud. Proc. Code Ann. § 3-814(c) 7, 8
Md. Cts. & Jud. Proc. Code Ann. § 3-831 ..... 9, 10

REPLY ARGUMENT

I. THE RESPONDENT HAS FAILED TO APPLY THE TESTIMONIAL ANALYSIS OF *FISHER* AND *SCHMERBER*.

This Court has repeatedly held that an order to produce evidence may be barred by the Fifth Amendment privilege only if the act of production itself communicates significant and incriminating testimonial information. *Doe* v. *United States*, 487 U.S. ____, 108 S.Ct. 2341 (1988) ("*Doe II*"); *United States* v. *Doe*, 465 U.S. 605 (1984) ("*Doe I*"), *Fisher* v. *United States*, 425 U.S. 391 (1976); *Schmerber* v. *California*, 384 U.S. 757 (1966). Nevertheless, Ms. Bouknight shuns this well-settled test, implying instead that the juvenile court's otherwise valid order to present Maurice was somehow tainted by a police investigation then underway. (Resp. Br. at 3, 6, 10). Factually and legally, Ms. Bouknight is wrong; the existence of a collateral criminal inquiry did not prompt the juvenile court to order Maurice's production and does not affect the limited questions presented to this Court. More important, Ms. Bouknight has failed to explain why production of Maurice would necessarily reveal testimonial information not already known or assumed by the juvenile court. Put simply, she has not established a *prima facie* claim of privilege.

A. Police Activity Is Not A Relevant Consideration.

Contrary to Ms. Bouknight's insinuations that the juvenile court acted in concert with the police to compel her to reveal incriminating evidence, (Resp. Br. at 2, 5), the court's singular concern was, and is, Maurice's protection. Throughout the proceedings, the court spoke evocatively of its imperative duty to find and safeguard Maurice. On April 20, Judge Angeletti explained,

> [W]e are not picking [the mother] up for purposes of punishing her. We are picking her up in an effort to find her child.

* * *

> What this court has to look at is what is in the best interest of the child. And quite frankly, that child is paramount on this court's mind . . . . [T]he child is a baby. Based on all the information before the [c]ourt, it is obvious that the child is in some jeopardy because of the actions of the mother in refusing to bring her [sic] in.

(J.A. 53-54). Similar sentiments were voiced by Judge Mitchell at subsequent hearings:

> [April 28] No one asked her what has happened to the child or whether she committed any act that in anyway [sic] harmed the child. The only thing that is required here is that she produce the child pursuant to the order of this [c]ourt.
>
> * * *
>
> [May 25] It is a given fact that there is great fear for this child.
>
> * * *
>
> The State has indicated that the child is at risk. We don't [know] where the child is—a 19-month old child whose whereabouts . . . is unknown, is at risk under any circumstances.

(J.A. 72, 152-53). The juvenile court ordered Maurice's production solely to enforce its order of shelter care and ensure his safety, not to further an independent homicide investigation. In any case, since the issue only addresses the reasonableness of Respondent's fear of incrimination, it is irrelevant to the narrow testimonial question at hand.

Ms. Bouknight's claim that "the state believed this a homicide case at the time this contempt order was sought," (Resp. Br. at 10), is similarly disingenuous. At most, the record reveals that the assigned protective services worker thought homicide possible, (J.A. 90, 95), and that he communicated with a homicide detective when

conducting his own search for Maurice. (J.A. 93). While Petitioner Baltimore City Department of Social Services ("BCDSS") and the court have acknowledged the possibility that Maurice might no longer be alive, their concern hardly constitutes a binding legal position.[1] The simple facts remain that (1) an independent police investigation neither converts the civil proceedings below into a homicide trial nor establishes a prosecutorial purpose lurking behind the court order; (2) the evidence in this case indicates that Maurice is missing without explanation, not that he has been fatally injured; and (3) the juvenile court has conclusively determined that Maurice is at risk of harm and in need of protection.

B. Maurice's Condition Does Not Affect The Testimonial Analysis.

Assuming, however, that Ms. Bouknight's "worst case scenario" (Resp. Br. at 10) is true and Maurice is dead, the court's order still poses no threat of compelled testimony. Production of a deceased child holds no more *testimonial* significance than does presentation of the same child alive. Obviously, any evidence of severe harm or fatality would elevate Ms. Bouknight's fear of incrimination, but, as the *Fisher* court recognized, the inculpatory nature of a subject has no bearing on whether its production is testimonial: "[H]owever incriminating the contents of the accountant's workpapers might be, the act of producing

---

[1] The mother's effort to cast this case as a homicide investigation contradicts her own consistent reassurances to the court and BCDSS that Maurice is alive, healthy, and well-placed. (J.A. 42, 54, 65-66, 70, 83, 87). Even though these statements directly undermine the validity of her fear of incrimination, she offers no explanation why her position in court should be disregarded in favor of speculation by the court and a protective service worker.

them . . . would not itself involve testimonial self-incrimination." 425 U.S. at 410-11. Thus, in emphasizing the possibility that Maurice might be dead, the mother merely conflates her fear of incrimination with the separate testimonial analysis mandated by *Fisher*, *Doe I* and *Doe II*.

Ms. Bouknight's second assumption, that Maurice's "body [might] no longer [be] in existence," (Resp. Br. at 10), does not alter the testimonial analysis, either. A party unable to comply with a civil court's or legislature's valid order of production bears the burden of asserting impossibility and persuading the tribunal. *United States* v. *Rylander*, 460 U.S. 752, 757 (1983); *McPhaul* v. *United States*, 364 U.S. 372, 379 (1960); *United States* v. *Fleischman*, 339 U.S. 349, 362-63 (1950). Even if Ms. Bouknight's explanation of impossibility were potentially incriminating, the Fifth Amendment privilege would not excuse her from satisfying either burden.

> But while the Fifth Amendment privilege against compulsory incrimination may be a valid ground upon which a witness . . . declines to answer questions, it has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production.

United States v. *Rylander*, 460 U.S. at 758. So long as the order to produce Maurice is itself valid, the mother must produce him or assert her inability to comply. In any case, the issue is not yet ripe. Since Ms. Bouknight has never suggested that compliance is impossible in fact, she cannot now ask the Court to assume impossibility simply because it is conceivable in theory.[2]

---

[2] The deference accorded to fears of potential incrimination does not extend to impossibility, an analytically distinct issue. Contrary to Ms. Bouknight's assertion, (Resp. Br. at 10 n.12), *Hoffman* v. *United States*, 341 U.S. 479, 486-87 (1951), never addressed impossibility. Indeed, in those cases where this Court has considered the nexus between impossibility and the Fifth Amendment, it has "squarely rejected the notion that a possible failure of proof of an issue where the defendant had a burden of proof is a form of 'compulsion' which requires that the burden be shifted from the defendant's shoulders to that of the government." *United States* v. *Rylander*, 460 U.S. at 758.

As for the "act of production" analysis itself, Respondent offers scant authority to explain why Maurice's production would be testimonial. Her claim that *Schmerber* is limited to "search cases", for instance, ignores repeated decisions by this Court which have upheld the testimonial standard without even mentioning the Fourth Amendment.[3] Furthermore, Respondent's analogy to state court decisions which prohibit production of a "corpus delecti" fails to consider the impact of her legal relationship to Maurice. When Ms. Bouknight regained physical and legal custody of her son, she settled as a matter of law any question about his subsequent control or dominion. If she produces Maurice as directed, she communicates nothing new—she merely confirms the legal presumption that she retains custody. Unlike the criminal suspects in the "corpus delecti" cases, who had no custodial relationship with the items in question, Ms. Bouknight's legal obligation to care for Maurice leaves her no privilege to conceal him from the juvenile court. *See, e.g., Braswell* v. *United States*, 487 U.S. ___, 108 S.Ct. 2284, 2291-93 (1988); *Bellis* v. *United States*, 417 U.S. 85, 101 (1974).[4]

---

[3] *See, e.g., United States* v. *Wade*, 338 U.S. 218, 221 (1967); *Gilbert* v. *California*, 388 U.S. 263, 266-67 (1967), *Holt* v. *United States*, 218 U.S. 245, 252-53 (1910). The theory does not account for *Fisher* and subsequent "act of production" cases involving documents, not physical characteristics, of a suspect.

[4] Respondent's situation is more analogous to a bankrupt's duty to submit all private papers and possessions to the appropriate civil

II. THE RESPONDENT HAS FAILED TO CONSIDER THE COMPELLING INTEREST IN PROTECTING CHILDREN AT RISK OF INJURY.

Virtually every Fifth Amendment case previously considered by this Court has involved only two conflicting interests—the state's need for information and the suspect's fear of self-inculpation. Here, however, an innocent third party is directly affected by the mother's claim of privilege. Thus, for the first time in its Fifth Amendment jurisprudence, this Court is confronted with competing individual rights. It cannot uphold Ms. Bouknight's autonomous right against state compulsion without also eclipsing Maurice's own right to continuing protection by the state. Although Ms. Bouknight neither discusses Maurice's interests nor attempts to reconcile them with her own assertions of privilege, the necessity of choosing among these conflicting rights is inescapable.

A. The Juvenile Court's Order To Produce Maurice Does Not Compromise Core Values Of The Fifth Amendment.

Ms. Bouknight correctly notes that balancing should not be employed if crucial interests protected by the privilege are at stake. (Resp. Br. at 12-13). But, as she also acknowledges, *id.*, balancing is appropriate when the order in question only peripherally involves the historical purpose of the privilege—*i.e.*, "the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him." *Doe II*, 108 S.Ct. at 2348. For a number of reasons, her claim lies at a distant

---

court even if incrimination would ensue. Once the court lawfully transferred custody of Maurice, "[t]he question [was] not one of testimony but of surrender." *In re Harris*, 221 U.S. 274, 279 (1911). *See also McCarthy* v. *Arndstein*, 266 U.S. 34, 41 (1924).

frontier from the protections traditionally afforded by the privilege.

First, an order of production constitutes a much weaker individual intrusion than does a command to testify under oath. The distinction has been drawn repeatedly. from the early twentieth century cases of *In re Harris* and *McCarthy* v. *Arndstein* to more modern cases such as *Curcio* v. *United States*, 354 U.S. 118, 123-24 (1957) and *United States* v. *Rylander*, 460 U.S. at 760, and culminating recently in *Braswell* v. *United States*, 108 S.Ct. at 2293. Aside from actual testimony, this Court has afforded full protection only to private books and records, and then only because they "are generally little more than an extension of [one's] person." *Fisher* v. *United States*, 425 U.S. at 420 (Brennan, J. concurring). Since Maurice's surrender would not expose Ms. Bouknight's "private inner sanctum of individual feeling and thought," *Couch* v. *United States*, 409 U.S. 322, 327 (1973), only limited testimonial incrimination could result: an acknowledgement that she has control over her son as ordered by the court. That reaffirmation of her parental status is a far cry from the inquisitorial fears which spawned and sustained the privilege.

Second, as the mother concedes, (Resp. Br. at 13-14), incriminatory disclosures that are compelled by neutral, noncriminal statutes also lie at the fringe of the privilege. *California* v. *Byers*, 402 U.S. 424 (1971). The juvenile court's order here was expressly authorized by such a statute, Md. Cts. & Jud. Proc. Code Ann. ("CJP") § 3-814(c), and thus falls squarely within the *Byers* ambit. No meaningful distinctions can be drawn between § 3-814(c) and the *Byers* "hit and run" statute, *see* Maurice's Br. at 30-34, and Ms. Bouknight suggests nothing to the contrary. Indeed, Ms. Bouknight's only

response is to repeat her "homicide investigation" argument, (Resp. Br. at 14), even though the *Byers* analysis explicitly disregards an individual suspect's particular fear of incrimination. *California* v. *Byers*, 402 U.S. at 428 (Burger, C.J. plurality). Of course, had the Maryland statute expressly authorized sanctions against parents for exercising their fifth Amendment rights, balancing would not be permissible. *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977).[5] Yet § 3-814(c) does not punish privileged activity any more than it "evidences the purpose of gathering information from citizens to secure their conviction of a crime." *Marchetti* v. *United States*, 390 U.S. 39, 73 (1968) (Brennan, J. concurring). In forty-eight states and the District of Columbia, all with statutes parallel to § 3-814(c), compelling parents to bring their children at risk to court does no violence to the Fifth Amendment. *See* Maurice's Br. at 1a.

Most important, Maurice's independent interest in receiving court-ordered protection by the state, and the state's *parens patriae* responsibility to provide that protection, make this a unique Fifth Amendment case. Potential danger to Maurice constitutes the obvious crux of the balancing question before the Court, yet his mother completely sidesteps the issue, claiming that the state's interest is no stronger here than in any criminal prosecution. (Resp. Br. at 14). It is Ms. Bouknight's refusal to surrender Maurice which endangers him. Thus, her

[5] The *Lefkowitz* cases cited by Ms. Bouknight do not proscribe all instances of balancing under the Fifth Amendment, just the explicit practice of penalizing an assertion of privilege. Both *Lefkowitz* v. *Cunningham*, *id.*, and its forebear, *Gardner* v. *Broderick*, 392 U.S. 273, 278-79 (1968), expressly permit the imposition of sanctions against an individual who asserts the privilege so long as the penalty is directed at the general failure to fulfill a public duty.

assertion of privilege cannot be labeled as "purely passive", (Resp. Br. at 14 n.16), or otherwise distinguished from this Court's decisions which temper constitutional protections of adults when the health or welfare of children are jeopardized. Even in a Fifth Amendment context, *New York* v. *Quarles*, 467 U.S. 649 (1984), applies a comparable analysis, waiving the Miranda rule if its exercise could threaten innocent third parties. Under any appropriate balancing of interests, the possibility, indeed the strong probability, that Maurice is alive and at risk must outweigh Respondent's hypothetical speculation that he could be dead.

B. Criminal Prosecution Is No Solution To Maurice's Immediate Need For Protection.

Contrary to Respondent's assertion, (Resp. Br. at 13-14), her failure to produce Maurice is not a crime under CJP § 3-831. That statute requires proof beyond a reasonable doubt that an adult's conduct "renders a child . . . in need of assistance." Without Maurice's appearance, however, the state cannot possibly know the effect of Ms. Bouknight's defiance. No evidence of injury exists, and his concealment alone is not dispositive of whether he has been placed in further need of assistance.[6] Surely Respondent is not suggesting that she can and should be

[6] The mother's analogy to English and French Renaissance criminal bans against the concealment of birth only reinforces the futility of applying § 3-831. Those laws presumably succeeded because they targeted the act of concealment itself, not the actual injury, if any, to the infant. It is no crime in Maryland to harbor one's own child. Indeed, prosecution is not even a rational alternative to civil contempt since it offers no guarantee of incarceration or opportunity for purgation.

prosecuted for the conjectural possibility that she may have committed a criminal act.

Even if prosecution were possible, under Respondent's reading of the Fifth Amendment it would be unconstitutional. Both the "crime" in question and the order of contempt target identical conduct—Ms. Bouknight's refusal to produce her son. As BCDSS has noted, (Br. at 32 n.25), if the Fifth Amendment immunizes her recalcitrance against the lesser sanction (civil contempt) it must also shield her against the stronger (criminal conviction). *See Lefkowitz* v. *Cunningham*, 431 U.S. at 806 (1977). Respondent's advocacy of prosecution under § 3-831 is more than ironic; it oddly resembles Petitioners' arguments that no testimonial disclosure has been compelled: "The criminal prosecution . . . does not depend on Respondent doing or saying anything, and therefore does not implicate the Fifth Amendment at all." (Resp. Br. at 16).

C. Maurice's Safety Must Be This Court's Paramount Consideration.

The urgency of locating and sheltering a missing, previously abused two year old child should be obvious. Ms. Bouknight nonetheless disputes any potential danger, contending that Maurice cannot be at risk since BCDSS enforcement of its duty to protect and supervise him was so dilatory. To be sure, the conduct of BCDSS may expose the agency and its workers to civil and even criminal liability if Maurice has been severely harmed. *See DeShaney* v. *Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1006-07 (1989); J.A. 134. Still, as with Joshua DeShaney, the Department's failure to provide appropriate protective supervision only compounds the degree of risk to Maurice. *See*

id., at 1011 (Brennan, J. dissenting), 1013 (Blackmun, J. dissenting). More important, BCDSS' actions are irrelevant; the juvenile court has already determined that Maurice is at risk and requires immediate protection, a dispositive finding which Respondent has never challenged or appealed. Blaming BCDSS may divert attention away from her own noncompliance, but it does not hide the simple fact that Ms. Bouknight's fear of incrimination may very well reflect Maurice's dire need.

Ultimately, all parents must be held accountable for the care they provide their children. This Court has already recognized a substantial number of overriding public interests which inveigh upon the outer scope of the privilege: prosecution of white collar crime, *Braswell* v. *United States*, 108 S.Ct. at 2294; public safety, *New York* v. *Quarles*, 467 U.S. at 655-56; deterrence of drunk driving, *South Dakota* v. *Neville*, 459 U.S. 553, 558 (1983); traffic accident reporting, *California* v. *Byers*, 402 U.S. at 428; bankruptcy adjudication, *McCarthy* v. *Arndstein*, 266 U.S. at 41; and corporate regulation, *Hale* v. *Henkel*, 201 U.S. 43, 74-75 (1906). Ms. Bouknight has yet to explain why this Court should find the important societal interest in protecting children at risk of harm any less crucial.

CONCLUSION

For the foregoing reasons and those presented in Petitioner's first brief, the decision of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

MITCHELL Y. MIRVISS
Counsel of Record
STUART R. COHEN
KATHI GRASSO
M. GAYLE HAFNER
SUSAN DISHLER SHUBIN
Legal Aid Bureau, Inc.
714 East Pratt Street—7th Floor
Baltimore, MD 21202-3105
(301) 539-5340
Attorneys for Petitioner Maurice M.